

MELINDA STEVENSON v. PP

COURT OF APPEAL, PUTRAJAYA

ABDUL RAHMAN SEBLI JCA

ZABARIAH MOHD YUSOF JCA

HASNAH MOHAMMED HASHIM JCA

[CRIMINAL APPEAL NO: K-05(M)-168-03-2018]

12 MARCH 2020

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused convicted for offence of trafficking in drugs and sentenced to death – Drugs found concealed in luggage bag – Identification of exhibits done during adjournment of court – Whether there was positive identification of alleged drugs exhibits during trial – Whether there was break in chain of evidence – Whether procedure in criminal trial complied with – Whether conviction and sentence safe – Whether ought to be set aside – Dangerous Drugs Act 1952, s. 39B(1)(a) – Criminal Procedure Code, s. 264*

The appellant, a South African national, arrived at the Langkawi International Airport ('LIA') from Singapore, in transit from Johannesburg, South Africa. The appellant proceeded to claim her luggage bag ('P54') and the customs officer ('PW3') in charge requested to scan P54. Suspicious images were seen when P54 was scanned. PW3 then instructed the appellant to open P54 and this led to the discovery of two gift-wrapped parcels, which according to the appellant, were souvenirs. When opened, SP3 found the parcels to contain packages of clear crystalline substances. PW3 apprehended the appellant and alerted his superior ('PW5') who conducted further examination on P54. The substances were later confirmed by the chemist to be 2,241.6g of methamphetamine. The appellant was charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. Satisfied that the prosecution had established a *prima facie* case, the Judicial Commissioner ('JC') called the appellant to enter her defence. In her defence, the appellant submitted that (i) she and her boyfriend ('Francois') had planned a vacation in Langkawi; (ii) they were scheduled to fly from Johannesburg and arrived at Langkawi transit from Singapore; (iii) however, the appellant flew to Langkawi alone while Francois took another flight to Langkawi from Singapore; (iv) Francois, who accompanied the appellant to the airport, had checked-in P54 and, therefore, had custody and control of P54 before it was checked-in; and (v) she was unaware of the parcels as someone, most probably Francois, could have placed them in P54. At the conclusion of the trial, the JC found the appellant's defence was a bare denial and an afterthought and failed to raise any reasonable doubt in the prosecution's case. The appellant was found

- A guilty, convicted for the offence and sentenced to death. Hence, the present appeal. In support of her appeal, the appellant submitted that, *inter alia*, there was no positive identification of the alleged drugs exhibits at the trial.

Held (allowing appeal):

- B (1) During the examination in chief of PW5, the prosecution did not refer him to any of the exhibits marked as 'ID16-ID119'. The prosecution conducting the trial had asked the court for a short adjournment for the purposes of identification of exhibits. The notes of evidence did not record what actually transpired during the break purportedly for the identification of exhibits. One could only assume or make conjecture that during the break, PW5 identified the exhibits. References were made to exh. P130 when the prosecution was examining PW5 but he was not referred to exhs. ID16-ID119. Why wasn't the identification of the exhibits done during the hearing, in the presence of the JC? This was not explained by the JC in the grounds of judgment nor the prosecution in their written submission. The failure to identify the exhibits before the JC had caused a serious break in the chain of evidence. (paras 22, 24 & 26)
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- E (2) Section 264 of the Criminal Procedure Code ('CPC') provides that all evidence shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his advocate. Any exhibit to be admitted before the trial must be by the consent of the accused and his/her advocate and agreed to before the commencement of the trial. In a criminal trial, the procedure, as provided by the CPC, must be strictly adhered to. In the instant appeal, the JC allowed a procedure not provided under the CPC upon the request of the prosecution that was so severe that it severed the chain of evidence. The conviction was unsafe. The conviction and sentence passed by the JC were set aside. The appellant was acquitted and discharged of the offence. (paras 33, 36 & 37)
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Case(s) referred to:

Abdullah Yaacob v. PP [1991] 1 LNS 68 SC (*refd*)

Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA (*refd*)

Lew Wai Loon v. PP [2014] 2 CLJ 649 FC (*refd*)

Ogbodo Sunday Tochukwau v. PP & Other Appeals [2016] 9 CLJ 686 CA (*refd*)

- H *Sia Pang Liong v. PP* [2012] 9 CLJ 848 FC (*refd*)

Su Ah Ping v. PP [1979] 1 LNS 100 FC (*refd*)

Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ 9 (Rep) 386 SC (*refd*)

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Legislation referred to:

Criminal Procedure Code, ss. 172A, 172B, 264

Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2), First Schedule

For the appellant - Simon Murali & Kok Yuen Lin; M/s Simon Murali & Co

For the respondent - Wong Poi Yoke; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Melinda Stevenson [2018] 1 LNS 1892 (overruled).]

Reported by Najib Tamby

JUDGMENT**Hasnah Mohammed Hashim JCA:**

[1] This is the appellant's appeal against the decision of the High Court which convicted the appellant of the charge against her under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for the offence of trafficking in 2,241.6g of methamphetamine punishable under s. 39B(2) DDA. The charge reads as follows:

Bahawa kamu pada 12 Oktober 2014 lebih kurang 9.15 malam di Balai Ketibaan Lapangan Terbang Antarabangsa Langkawi (LTAL), di dalam daerah Langkawi, dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 2,241.6 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] At the High Court after a full trial, the learned Judicial Commissioner on 13 March 2018 found the appellant guilty as charged under s. 39B(1)(a) DDA. The appellant was convicted by the learned JC and sentenced to death.

[3] Before us, the appellant appealed against conviction and sentence. We heard the appeal on 5 August 2019 and after perusing the records of appeal and considering both the written and oral submissions of the learned Deputy Public Prosecutor (DPP) and learned appellant's counsel, we allowed the appeal and set aside the conviction and sentence. We now give our reasons.

The Case For The Prosecution

[4] The facts as narrated by the High Court are as follows. On 12 October 2014 at 8.20pm, Melinda Stevenson ('the appellant'), a South African national arrived at the Langkawi International Airport ('LIA') via flight SILKAIR (MI0368) from Singapore, in transit from Johannesburg. After the appellant passed through immigration control, she proceeded to claim her trolley luggage bag ('P54') at the baggage carousel at the airport. PW3, Muhd Ridzuan Abdul Ghani a customs officer who was in charge of inspecting

A incoming passengers' baggage at the airport was stationed at a scanner machine at the material time. He noticed a female passenger, the appellant behaving suspiciously holding P54 wrapped with a blue luggage-wrapper plastic. PW3 requested the appellant to place P54 into the scanner machine for scanning purposes. She placed P54 into the scanner machine. Zaidi Abdul
B Razak ('Zaidi'), the officer manning the scanner scanned the appellant's luggage. When P54 passed through the scanner machine, Zaidi saw through the screen monitor suspicious images and asked PW3 to conduct further investigation of P54. PW3 in the meantime asked the appellant for her passport for purposes of verification of identification and confirmation that
C P54 belong to her. The particulars in the passport matched the information from the baggage tag which was tied around the handle of P54. After the verification, PW3 was satisfied that the appellant was the holder of the passport and the owner of P54.

D [5] The appellant was then asked to open P54 which was fully wrapped with a blue plastic wrapper. The appellant was given a pair of scissors and asked to cut the blue plastic wrapper covering P54 which was not locked. PW3 asked the appellant to open P54 and in it were clothes, toiletries and a book. The image on the scanning machine had shown images of suspicious looking items packed in P54. PW3 searched for the items in P54 but could
E not find anything. He then discovered a zipped compartment at the base of P54. He unzipped the compartment and discovered two concealed gift wrapped parcels, one with butterflies print and the other one with flower print.

F [6] When questioned by PW3 what was in the two parcels, the appellant told him that the parcels contained souvenirs that she plans to give to her friends in Langkawi. PW3 then placed the package wrapped with butterflies print on the scanning machine and the screen monitor showed two more packages in the gift wrapped parcel. He then asked the appellant what was inside the two parcels and she replied that the parcel contained chocolates.
G SP3 then proceeded to open the parcel wrapped with the butterflies print and discovered further two more packages wrapped in aluminium foil. He tore a bit of the aluminium foil and found a transparent plastic containing clear crystalline substance. PW3 apprehended the appellant and instructed her to remain seated whilst he called his superior, Suntherason a/l Rajagopal (PW5).

H [7] PW5 examined P54 and found the two parcels tucked away in the concealed compartment at the base of P54. When he opened the parcels, he found four packages wrapped with aluminium foil containing crystalline granular substances. The two parcels together with its content were then
I handed to Sahirman Mohd (PW7), the investigating officer attached to the Cawangan Penguatkuasaan Kastam Langkawi. PW7 sent the drug exhibits to the Chemistry Department for analysis by the chemist, Haslinda Ismail

(PW4). PW4 after conducting the necessary test confirmed that the substance found in the four packages is methamphetamine weighing 2,241.6g which is listed as dangerous drugs under the First Schedule of the DDA.

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Findings Of The Judicial Commissioner (JC)

[8] At the end of prosecution case, the learned JC found that the prosecution had made out a *prima facie* case against the appellant and proven the following elements:

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- (i) the subject matter concerned is 2,241.6g of methamphetamine;
- (ii) the appellant had possession and knowledge of the subject matter; and
- (iii) the appellant at the place, time and date stated in the charge against her did traffic the subject matter.

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[9] The learned JC found that the prosecution had proven that the drug seized was the type, nature and weight as testified by the prosecution witnesses. The evidence revealed the quantity of drugs was in excess of the statutory minimum prescribed under s. 37(da) of the DDA and militates against any argument that the drugs were for personal use.

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[10] The learned JC found that the prosecution had proven direct trafficking as defined under s. 2 of the DDA. The manner in which the drugs were packed was deliberate to avoid detection as well as the fact that the appellant arrived in LIA showed that appellant was carrying the said drugs for the purpose of trafficking. The learned JC found that the appellant had both custody and control of P54 and knew the contents of the two parcels concealed in P54.

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[11] The learned JC found that the prosecution had proven a *prima facie* case against the appellant as per the charge preferred against her. The appellant was called to enter her defence on trafficking.

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The Defence

[12] The accused elected to give an unsworn statement from the dock. In her prepared written statement, the appellant told the court that she and her boyfriend, Francois had planned a vacation in Langkawi, Malaysia. They were scheduled to fly from Johannesburg, South Africa and arrived at Langkawi transit from Singapore. However, the appellant flew to Langkawi alone. Francois, her boyfriend, purportedly took another flight to Langkawi from Singapore. However, he accompanied the appellant to the airport and was the one according to the appellant checked-in P54. She alleged that he was the one who had custody and control of P54 before it was checked-in. The appellant claimed that she was unaware of the parcels and told PW7 that someone most probably her boyfriend could have placed the two parcels in P54:

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- A Q46A: Mr. Suntheresan Took Statement From Me About 1 Hour (*sic*)
And During The Statement Taking Event, I Had Mentioned And
Narrated To Him In Details (*sic*), With All Particulars, Such As
Where I Came From, From Which Airport I Check In, And The
Fact That The Bag, Where They Said They Found Drugs Were
B Actually Was Brought In, To The Airport By My Boyfriend And
Was Checked In By Him Too And That I Suspected He Might
Have Put Or Placed Those 2 Boxes Into The Bag, And I Also Told
Mr. Suntheresan That My Boyfriend Should Come Tomorrow And
That I Suspected My Boyfriend Could Put The Boxes In My Bag
When I Was Smoking Before Checking In ...

C **Findings At The Conclusion Of The Trial**

- [13] At the end of the prosecution's case, having regard to the totality of the evidence adduced, the circumstances and the probabilities of the case, the learned JC found that the charge had been proven beyond reasonable doubt against the appellant. After considering the appellant's version of her
D defence, the learned trial judge found that the appellant had failed to raise any reasonable doubt in the prosecution's case. The learned JC found the appellant's defence that she had no knowledge of the impugned drugs to be a bare denial and an afterthought and rejected the appellant's defence of no knowledge.

- E [14] The learned trial judge also found that the appellant had failed to rebut both the statutory presumptions under s. 37(d) and (da) DDA on the balance of probabilities. The appellant was convicted and sentenced to suffer the mandatory death penalty as mandated under s. 39B(2) DDA.

F **Our Deliberation And Decision**

- [15] Before us, learned counsel for the appellant canvassed mainly three points in his submissions, namely:

- (i) no positive identification of the alleged drug exhibits at the trial;
G (ii) the evaluation of the defence case was flawed as the court had erroneously drawn inference against the appellant; and
(iii) the grounds of judgment alluded to a different charge.

- [16] The crux of the appellant's defence was that she had no knowledge of the drugs and that the drugs did not belong to her. Learned counsel for the
H appellant submitted that there was no positive identification before the court in respect of the two gift-wrapped parcels and the four packages wrapped with aluminum foil inside the parcels. The two parcels were not even produced in court. None of the prosecution witnesses made specific reference to any parcel. According to learned counsel in his submission, there is
I nothing in the record indicating that the two parcels were specifically identified and tendered by the relevant witnesses. The two parcels constitute an important evidential component as the drugs that were packed and

wrapped in aluminium foil were found in the two parcels which were concealed in compartment in P54. It was argued that the prosecution failed to establish the chain of evidence in respect of the exhibits since there was no mention of the parcels that purportedly contained the drugs (P128 A-D).

[17] It was the submission of learned counsel for the appellant that according to PW3 and PW5, one parcel was wrapped in a gift wrapping paper with butterflies print and the other, wrapped in a wrapping paper with flower print. According to the prosecution witnesses, in each of the parcels, there were four packages wrapped in aluminium foil found. However, none of the witnesses made any specific reference to any of the parcels and there is nothing in the transcribed notes of evidence indicating that the parcels were tendered and marked as exhibit.

[18] Learned counsel highlighted that at the trial the exhibits ie, P16 - P119 were not identified in open court which is the usual and accepted practice in a trial. What had happened in this case was that the learned Deputy Public Prosecutor (DPP) in the midst of the examination-in-chief of PW5 had requested the court to stand down the hearing for purposes of identification of the exhibits. This request was granted by the learned JC. When the trial resumed after a 25 minutes' break, the DPP continued with the examination-in-chief of SP5 and asked him whether he managed to identify all the exhibits to which he answered in the affirmative. PW5 did not identify the exhibits in open court in the presence of the JC as well as the appellant's counsel and the appellant. In the absence of positive identification of the exhibits, the prosecution failed to establish the chain of evidence. Relying on *Sia Pang Liong v. PP* [2012] 9 CLJ 848, learned counsel urged this court to allow the appellant's appeal and that the appellant be discharged and acquitted of the offence charged.

[19] In response, learned DPP argued that there was no break in the chain of evidence as the prosecution witnesses had positively identified the exhibits which were all duly tendered and marked. There was no break in the chain of evidence as all exhibits, in particular P128A-D were all identified and marked through the respective officers handling the exhibits ie, the store keeper (PW1), the enforcement officer (PW5), the chemist (PW4) and the investigating officer (PW7). The movement of the exhibits were all explained by the prosecution witnesses.

[20] The learned JC found that there was no break in the chain of evidence as explained in his grounds of judgment:

[36] Saya berpendapat tidak ada keraguan mengenai identiti dadah-dadah tersebut. Pihak pendakwaan telah berjaya membuktikan tidak ada kelompangan di dalam rantaian keterangan barang kes daripada mula ianya dirampas oleh SP: 5 sehinggalah diserahkan kepada Pegawai Penyiasat [SP: 7]. Selanjutnya SP: 7 menyerahkan barang kes dadah kepada Ahli Kimia [SP: 4] untuk dianalisa. Kesemua

- A barang kes yang dirampas telah ditandakan dengan sempurna oleh SP: 7 dengan menurunkan tanda tangan dan tarikh. SP: 7 juga mengecam semua penandaan yang dibuat olehnya di Mahkamah. SP: 7 juga mengecam barang-barang kes berdasarkan kepada gambar-gambar barang kes yang diambil selepas tangkapan.
- B **[21]** To determine what transpired during the trial, we need to examine the notes of evidence. During the examination-in-chief of PW5 he narrated what he did when he conducted the ‘proses pembongkaran’:
- TPR: Boleh kamu ceritakan proses pembongkaran yang kamu laksanakan?
- C SP5: ... Seterusnya, saya menandakan bag bagasi yang besar berwarna coklat sebagai “C.” Hasil dari pemeriksaan di luar, saya hanya menemui wrapping plastic zip kedua dimana saya turunkan tandatangan pada plastic tersebut. Di bahagian zip, tidak ada apa-apa barang selain barang itu. Selepas itu, saya membuka bagasi tersebut dan saya mendapati bagasi itu diisi pakaian. Saya menyenaraikan pakaian-pakaian mengikut turutan, C1 dan saya juga
- D tidak menjumpai apa-apa di bahagian tersebut. Selepas itu, saya mendapati ada satu lagi bahagian bezip dibawah bahagian bagasi tersebut. Selepas itu, saya membuka zip tersebut dan saya dapati ada dua bungkusan di bahagian tersebut. Saya tandakan bahagian tersebut sebagai “C 2”. Hasil daripada pemeriksaan saya ke atas
- E bungkusan tersebut, bungkusan 1 sebagai C 2 1. Selepas saya membuka bungkusan tersebut dengan pisau, saya dapati ada aluminium foil di dalamnya. Selepas pemeriksaan rapi, saya dapati ada dua bungkusan aluminium foil. Selepas itu, saya menggunakan pisau memotong plastik di bahagian hadapan bungkusan 1 iaitu C-2-1-1 dengan pisau.
- F (See: Record of Appeal Vol 2; page 79)
- [22]** It is observed that at this stage of examination-in-chief of PW5, the DPP did not refer the witness to any of the exhibits which were marked as ID16 - ID119. The learned DPP conducting the trial had then asked the
- G court for a short adjournment for the purposes of identification of exhibits. However, he did not inform the court that the exhibits to be identified were ID16 - ID119:
- TPR: Kamu boleh cam ke semua eksibit yang telah kamu bongkar?
- H SP 5: Boleh
- TPR: **Saya pohon kes ini ditangguhkan sebentar untuk tujuan pengecaman.**
- Mahkamah: Tangguh sebentar @ 3.45petang
- I (See: Record of Appeal Vol 2; page 85)
- (emphasis added)

[23] At 4.10pm according to the transcribed notes of evidence, the court resumed and it was only at this stage that the learned DPP referred PW5 to exhs. ID16-ID119:

TPR: Dengan izin Yang Arif untuk teruskan pemeriksaan ini. **Sewaktu penangguhan awak dirujuk dengan kesemua eksibit yang kamu bongkarkan.** Boleh kamu sahkan dan camkan?

SP5: Ya. **Saya dapat camkan kesemua barang yang ditandakan saperti di dalam borang bongkar**

TPR: Eksibit-eksibit yang dimaksudkan ialah **ID16 - ID119** dan P128A hingga D. Saya pohon agar excibit-excibit (*sic*) ID 16-ID119 di tanda semula sebagai P.

Mahkamah: P16-P119

(See: Record of Appeal Vol 2; page 86)

(emphasis added)

[24] As pointed out by learned counsel for the appellant, the identification of the exhibits was done when the court adjourned at the request of the DPP. The notes of evidence did not record what had actually transpired during the break purportedly for the identification of exhibits. One can only assume or make conjecture that during the break, PW5 identified the exhibits. References were made to exh. P130 when the DPP was examining PW5 but the witness was not referred to exhs. ID16-ID119. Why was not the identification of the exhibits done during the hearing in the presence of the judge? This was not explained by the learned JC in his grounds of judgment nor the learned DPP in her written submission. Identification of exhibits was done in open court during the examination-in-chief of Sahirman Mohd, Penolong Pengarah Kastam (PW7):

TPR: Dengan izin. Untuk menjimatkan masa saya pohon untuk SP7 mengecam secara kolektif excibit (*sic*) **P16 sehingga P119**, excibit (*sic*) **P128 A hingga B**. Pohon kebenaran untuk saksi mendekati barang kes.

(SP7 mendekati barang kes untuk membuat pengecaman)

TPR: Encik Sahirman, kamu telah melihat kesemua barang kes sebentar tadi adakah kamu camkan kesemua barang kes?

(SP7 telah menyemak dan membuat pengecaman barang kes)

(see: Record of Appeal, Vol 2; page 118)

[25] Abdul Hamid CJ (later LP) in the Supreme Court case of *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386; [1987] 1 MLJ 220, observed:

Insofar as the trial Court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine

- A whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi's* case, *supra*). We would observe at this point that the law is clear in that "it is unnecessary to call evidence to ensure there is no break in the chain of evidence." (*Su Ah Ping v. PP* [1980] 1 MLJ 75. But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.
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[26] We had considered the evidence and the criminal procedure on this aspect of the defence case very carefully. In our view, in the circumstances of the case, the failure to identify the exhibits before the learned JC had caused a serious break in the chain of evidence. In *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551, the Court of Appeal held at pp. 568-569:

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- First, by way of a general observation, I am of the view that, in a drug trafficking case *what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc. and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls.* There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc., and it is for the trafficking of that same substance that the accused is charged with.
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- F The proof of the chain of evidence is only a method of proving that fact. *The fact that there is "a gap", does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that "gap" the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.*
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(emphasis added)

- [27] In *Su Ah Ping v. PP* [1979] 1 LNS 100; [1980] 1 MLJ 75, the appellant had been convicted of possession of four pistols and 175 rounds of ammunition and sentenced to death. In the course of his interrogation by the police, the appellant had led the police to the place where he hid the pistols and ammunition and the exhibits were found. The exhibits were handed over by Inspector Takbir to another police officer. At the trial, Inspector Takbir produced the exhibits and identified them. No other police officers who had handled the exhibits were called to testify. No objection was raised by the
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defence. At the appeal, it was argued that there was a break in the chain of evidence. It was held by the Supreme Court that it is unnecessary to call evidence to ensure that there is no break in the chain of evidence. If the officer who picked up the object at the scene produced it and identified it as that very object that is enough and there is no need to call every other officer who handled it, unless there is doubt as to the identity.

[28] On the issue of proof of exhibits and the necessity of calling the witnesses, Tun Suffian LP said:

The complaint before us was not that there had been no proof that the exhibits were serviceable, but simply that there was a “break in the chain of evidence”, and the prosecution should have called as witnesses all the officers through whose hands the exhibits passed from Inspector Takbir to the armourer and back to the inspector. We do not think there is merit in this point. The question was whether the exhibits the Inspector produced were the guns and ammunition he found at the scene, and as when he produced them as those very guns and ammunition there was no objection by the defence, it would have been a waste of judicial time to call all the intervening handlers. In our experience much judicial time is spent unnecessarily, notably in subordinate courts, in ensuring no break in the chain of evidence. In our judgment, if the officer who picked up an object at the scene produced it and identified it as that very object, that is enough, and there is no need to call every other officer who handled it.

[29] Hashim Yeop A Sani CJ (Malaya) delivering the judgment of the Supreme Court in *Abdullah Yaacob v. PP* [1991] 1 LNS 68 emphasised:

It is certainly true that, as was said in *Su Ah Ping v. PP* [1980] 1 MLJ 75, the Federal Court had held there that it is not required of the prosecution to call all the officers or the persons concerned who had seen or identified an exhibit. This is not the real intention of the law. *Su Ah Ping* [1980] 1 MLJ 75 only decided the general principles. *But the facts of one case differ from those of another and the duty of the prosecution in each case is to prove the case beyond any reasonable doubt to the court. The case must be clearly proved without [reasonable] doubt or question that can be raised about the exhibits.* See also *Teo Hoe Chye v. PP* [1987] 1 MLJ 220 at p 229. There should be no break in the chain of evidence giving rise to doubt relating to the exhibits. (emphasis added)

[30] In the instant appeal, PW5, the officer who had conducted the ‘proses pembongkaran’, did not identify the objects in open court but only did so during the short break. When the court resumed, the exhibits were again collectively identified by PW5. The DPP did not explain to the court what had actually transpired during the break which he had requested for purposes of identification of the exhibits, that is, the exhibits that were identified during the break; whether the appellant’s defence counsel at that time was present during the identification of the exhibits; whether there was any objection made by the assigned defence counsel.

A [31] The Federal Court in *Lew Wai Loon v. PP* [2014] 2 CLJ 649 held:

[26] In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. *Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.* (emphasis added)

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C [32] The identification of the exhibits by PW5 is critical to the prosecution's case. Even though PW5 was asked again in open court to identify the exhibits, it does not validate what had transpired when the case was adjourned and the process of identification as requested by learned DPP, was conducted in the absence of the learned JC. Furthermore, we have scrutinised the transcribed notes of evidence and we noted that throughout the examination-in-chief of PW5, exhs. ID16 - ID119 which eventually were marked as P16 - P119 were never referred to him.

D [33] In *Ogbodo Sunday Tochukwau v. PP & Other Appeals* [2016] 9 CLJ 686, this court held:

The dispensation of justice involved both procedural and substantive law. Justice cannot be dispense when its procedures are ignored.

E The Criminal Procedure Code (CPC) prescribed procedures in criminal proceedings. Section 264 of the CPC provides that all evidence shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his advocate:

F Except as otherwise expressly provided all evidence taken under Chapters XIX and XX shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his advocate.

[34] Section 172A CPC sets out the matters an advocate representing an accused may discuss with the prosecution during the pre-trial conference:

- G (a) identifying the factual and legal issues;
- (b) narrowing the issues of contention;
- (c) clarifying each party's position;
- (d) ensuring the compliance with s. 51A;
- H (e) discussing the nature of the case for the prosecution and defence, including any alibi defence that the accused may rely on;
- (f) discussing any plea bargaining, and reaching any possible agreement thereto; and
- I (g) any other matters as may be agreed upon by the advocate representing the accused and the prosecution that may lead to the expeditious disposal of the case.

All matters agreed upon in the pre-trial conference by the advocate and the prosecution shall be reduced into writing and signed by the accused, the advocate and the prosecution.

[35] Section 172B CPC provides that at the case management, the judge shall:

- (i) take into consideration all matters that have been considered and agreed to by the accused and his advocate and the prosecution during the pre-trial conference; and where a plea bargaining has been agreed between the accused and his advocate and the prosecution during the pre-trial conference, the Magistrate or the Sessions Court Judge or the Judge trying the case shall decide on the voluntariness of the accused in the plea bargaining according to the provisions of s. 172C;
- (ii) where no pre-trial conference has been held on the ground that the accused is unrepresented, discuss with the accused and the prosecution any matter which would have been considered under s. 172A;
- (iii) assist an accused who is unrepresented to appoint an advocate to represent the accused;
- (iv) determine the duration of the trial;
- (v) subject to subsection (3), fix a date for the commencement of the trial;
- (vi) **subject to the consent of the accused and his advocate, and the prosecution, admit any exhibits;** and
- (vii) give directions on any other matter as will promote a fair and expeditious trial. (emphasis added)

[36] Any exhibit to be admitted before the trial must be by consent of the accused and his advocate and agreed to before the commencement of the trial. In criminal trial, the procedure as provided under the CPC must be strictly adhered to. In the instant appeal, the learned JC allowed a procedure not provided under the CPC upon the request of the learned DPP that is so severe that it severed the chain of evidence.

Conclusion

[37] Therefore, we found the appeal had merit and warranted our intervention. On reading the records of appeal before us, we found the conviction to be unsafe. We unanimously allowed the appeal. The conviction and sentence passed by the learned JC are set aside. The appellant is acquitted and discharge of the offence.